In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, APPELLANT,
v.
HARRY W. LUSKEY. } No. 371.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

The petition in this case alleges in substance that the claimant, a chief machinist's mate, was, on the 15th day of September, 1915, designated by the Secretary of the Navy for duty involving actual flying in aircraft, including balloons, dirigibles, and aeroplanes, and at once entered upon that duty and continued therein until February 1, 1917; that he was paid an increase of 50 per cent over his former pay during the entire period he was on such duty; that subsequently the increase paid him from July 1, 1916, to February 1, 1917, amounting to $329, was checked against him and withheld from pay subsequently accruing; that thereafter he made a claim to the Auditor for the Navy Department, and was informed

that he would be allowed the extra pay only for the months in which he actually made flights; and the petition was filed to recover the extra pay of 50 per cent disallowed from July 1, 1916, to February 1, 1917 (R. 1, 2).

The Court of Claims found that the petitioner was detailed for duty involving actual flying in aircraft from September 15, 1915, to February 1, 1917; that "*during all that time he was under orders detailing him for duty involving actual flying, and made actual flights, one of which was in September, 1916, and two others in December, 1916, and was at all times capable of flying if so ordered*"; that he received 50 per cent additional pay in the sum of $329 for duty involving actual flying in aircraft from July 1, 1916, to January 31, 1917, a period of seven months; that at a later date the amount was checked against and deducted from his pay, but that on application to the accounting officers he was allowed and paid a certain amount for the month of December, 1916, and that if entitled to be paid 50 per cent additional pay as chief machinist's mate, U. S. N., during that period, less pay received for December, 1916, he should receive $279.95; and the court held that he was entitled to the amount stated (R. 2, 3). The reason for so holding was thus stated by the court:

> The plaintiff is an enlisted man and was lawfully detailed "for duty involving actual flying in aircraft." The Congress did not fix the pay on the number of times an enlisted man actually flew, nor on the number of days

he was engaged in actual flying, but based it upon the time for which he was detailed necessarily involving him in actual flying. The word "involving" used in the statute may be inept, but its meaning in the connection in which it is used is plain and not to be mistaken, and that is, that the pay is not made dependent upon the number of flights while on such duty, but is made dependent on the detail to such duty. When, therefore, the plaintiff was lawfully detailed to duty involving actual flying in aircraft he must be regarded and treated as entitled to the consequences of such detail and to the pay provided for such duty. (R. 3.)

STATUTE.

The claim is based upon the provisions of the Act of March 3, 1915, Ch. 83, 38 Stat. 939, which read as follows:

> Hereafter officers of the Navy and Marine Corps appointed student naval aviators, *while lawfully detailed for duty involving actual flying* in aircraft, including balloons, dirigibles, and aeroplanes, shall receive the pay and allowances of their rank and service plus thirty-five per centum increase thereof; and those officers who have heretofore qualified, or may hereafter qualify, as naval aviators, under such rules and regulations as have been or may be prescribed by the Secretary of the Navy, shall, *while lawfully detailed for duty involving actual flying* in aircraft receive the pay and allowances of their

rank and service plus fifty per centum increase thereof. Hereafter enlisted men of the Navy or Marine Corps, *while detailed for duty involving actual flying* in aircraft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service, or rank and service, as the case may be, plus fifty per centum increase thereof: *Provided*, That not more than a yearly average of forty-eight officers and ninety-six enlisted men of the Navy, and twelve officers and twenty-four enlisted men of the Marine Corps, detailed for duty involving actual flying in aircraft, shall receive any increase in pay while on duty involving actual flying in aircraft, nor shall any officer in the Navy senior in rank to commander, nor any officer in the Marine Corps senior in rank to major, receive any increase in pay or allowances by reason of such detail or duty.

In the event of the death of an officer or enlisted man of the Navy or Marine Corps from wounds or disease, the result of an aviation accident, not the result of his own misconduct, received *while engaged in actual flying in or in handling aircraft*, the gratuity to be paid under the provisions of the Act approved August twenty-second, nineteen hundred and twelve, entitled "An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes," shall be an amount equal to one year's pay at the rate received by such officer or enlisted man at the time of the accident resulting in his death.

In all cases where an officer or enlisted man of the Navy or Marine Corps dies, or where an enlisted man of the Navy or Marine Corps is disabled by reason of any injury received or disease contracted in line of duty, the result of an aviation accident, *received while employed in actual flying in or handling aircraft*, the amount of pension allowed shall be double that authorized to be paid should death or the disability have occurred by reason of an injury received or disease contracted in line of duty, not the result of an aviation accident.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the claimant is entitled to recover extra pay for months during which he made no actual flight.

2. The court erred in not construing the statute to mean, that it was necessary to entitle an officer designated to such service to the extra compensation that he be actually engaged in flying, and that, when an unreasonable time elapses during which he makes no actual flight he is not entitled to extra pay for such period.

ARGUMENT.

The question in the case is whether the right of an officer of the Navy or Marine Corps to the extra pay provided for by the statute arises from *the detail* to a general duty which may or may not require actual flying, or from the specific duty which involves actual flying. In other words, is it *the detail* or *the flying, the possibility of a risk* or *the actual risk,*

that vests the right to the additional pay? Special attention is called to the repeated use of the word "actual" in connection with "flying." That is, the *duty* must involve actual *flying*. The word "duty" as here used manifestly does not include all kinds of work that are incident to a detail of that character, but is limited to the particular duty of flying; and the word "involving" is synonymous with "requiring."

It has been urged in the court below in this and other cases of like character that the fact that the gratuity to be paid under the Act specified for the death of an officer or an enlisted man of the Navy or Marine Corps is to be allowed when the wounds or disease results from an aviation accident received, not from his own misconduct, "while engaged in acts of flying in *or in handling* aircraft," and that the pension paid for the death of an officer or enlisted man of the Navy or Marine Corps from injury received by such officer or enlisted man is to be paid for an accident received "while employed in actual flying in *or in handling* aircraft," indicates that Congress intended that this extra pay should not depend upon actual flying. But do not these express provisions indicate just the contrary? Undoubtedly if the phrase "or in handling" had been omitted, neither the gratuity nor the pension would be payable for any accident which did not occur "while employed in actual flying." But petitioner insists and the Court of Claims holds that the extra pay must be allowed though the claimant may not engage in a

single flight or touch a single aircraft. In fact a case may be cited where an enlisted man was so detailed and was then placed at a desk in the Navy Department and did not see an aviation field during the entire period of the detail. Was it intended by Congress that he should be paid this extra compensation?

Unquestionably the additional pay was allowed because of the *extra risks* incident to the aviation service; and those risks are incident entirely to the *actual flying*, there being no greater risks incident to any other part of such service than there are to the regular Naval or Marine service.

The regulations of the Navy Department upon this subject which were in force during Luskey's detail are embraced in General Order No. 205, dated April 12, 1916, which reads as follows:

FLIGHTS BY NAVAL AVIATORS.

1. Student naval aviators and naval aviators will report to the department, Bureau of Navigation, at the end of each quarter, the number of flights made by them during that quarter.

2. Commanding officers having enlisted men under their command who are detailed for duty involving actual flying in aircraft will report at the end of each quarter the names, ratings, and number of flights made by each of them.

3. In the event of naval aviators being ordered to duty in connection with the aviation service that does not require "flying" as a

> part of that duty, the aviator concerned shall promptly inform the department and the officer having his accounts, in order that additional pay allowed by law for duty involving actual flying in aircraft may cease during the time they are so employed. (Navy Dept. Gen. Orders for 1916.)

It was recognized by this order that the right to the extra pay did not rest upon the *detail*. But it appears that the Navy Department took the position that it alone had the right to determine whether the duty to which an officer had been detailed involved flying in aircraft. And the construction of the statute coming before the Comptroller of the Treasury, he thus expressed his views in an opinion to the Secretary of the Navy given on April 21, 1917 (23 D. C. T. 590–591):

> The statute does not confer a right to the 35 and 50 per cent aviation pay merely by reason of the fact that an order has been issued reciting the fact that an officer or man is detailed to the duty in question. (Act of Mar. 3, 1915, 38 Stat., 939.) The detail it contemplates is the selection or setting apart of an officer or man for a duty "involving actual flying in aircraft." "Involving actual flying in air craft" means including actual flying in air craft as a necessary or logical consequence of the detail. Unless the duty for which the officer is detailed in fact, therefore, includes actual flying in aircraft, the detail is not such a detail as the statute contemplates and the increased pay which it provides does not become payable.

The statute does, therefore, make mandatory actual flying in aircraft by a detailed officer or man as a requisite for the aviation pay it provides for. It does not, however, fix the number of flights or the duration of the flights that the actual flying involved shall include. In the absence of any regulation by you to that effect an officer or man to whom orders of detail had issued and whose flight record is kept by the Bureau of Navigation under G. O. 205, April 12, 1916, showed no flight since the order of detail, or for an unreasonable length of time after order of detail, would not for that time be in fact detailed to duty involving actual flying and would not be entitled to the 35 or 50 per cent aviation pay. As to what would be considered by this office as such an unreasonable time would depend upon the facts in each particular case, and is not a question concerning which I can advise you generally.

Thereafter, on March 14, 1918, the regulations were changed by General Order No. 377 to read as follows:

FLYING REQUIRED UNDER FLIGHT ORDERS.

1. All naval personnel detailed for duty involving actual flying in aircraft shall, while so detailed, make flights in such frequency that at no time shall more than one calendar month intervene between flights.

2. In any case where more than one calendar month shall have intervened without a flight being made, flight orders will be held as

> in abeyance after the expiration of the first successive calendar month and will continue to be held in abeyance until the first of the succeeding month in which a flight is made. The receipt of increase in pay and allowances for duty involving flying will be prohibited during the period in which flight orders are in abeyance.
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> 3. In the case of individuals failing to perform a flight because of physical disability incident to flying, flight orders during the period of such disability will be considered as fully in effect. (Navy Dept. Gen. Orders for 1918.)

Undoubtedly Congress meant to apply the same rule as to extra pay to an officer of the Navy or Marine Corps assigned to aviation duty as it had applied about seven and a half months before to those detailed for exactly the same duties from the Army. It is helpful, therefore, to consider the language of the statute (Chapter 186, Act of July 18, 1914, Sec. 3, 38 Stat. 515, 516), which authorizes assignments from the Army to the Aviation Section of the Signal Corps. That statute reads as follows:

> Each aviation student authorized by this Act shall, *while on duty that requires him to participate regularly and frequently in aerial flights*, receive an increase of 25 per centum in the pay of his grade and length of service under his line commission. Each duly qualified junior military aviator shall, while so serving, have the rank, pay, and allowances of

one grade higher than that held by him under his line commission, provided that his rank under said commission be not higher than that of first lieutenant, and *while on duty, requiring him to participate regularly and frequently in aerial flights*, he shall receive in addition an increase of 50 per centum in the pay of his grade and length of service under his line commission. The rating of military aviator shall not be hereafter conferred upon or held by any person except as hereinafter provided, and the number of officers with that rating shall at no time exceed fifteen. Each military aviator who shall hereafter have duly qualified as such under the provisions of this Act shall, while so serving, have the rank, pay, and allowances of one grade higher than that held by him under his line commission, provided that his rank under said commission be not higher than that of first lieutenant, and, *while on duty requiring him to participate regularly and frequently in aerial flights*, he shall receive in addition an increase of 75 per centum of the pay of his grade and length of service under his line commission.

There can be no doubt about the meaning of the language here used. The duty is measured or defined by what the one detailed actually does. If he participates regularly and frequently in aerial flights, he is assigned to the duty which entitles him to the pay; if he does not so participate he is not assigned to such duty and does not receive the extra pay. The two acts were reported from different committees,

but when the committee reporting the Naval act used the expression "duty involving actual flying in aircraft," etc., they undoubtedly meant exactly the same thing that was meant by the other committee when it used the language "duty that requires him to participate regularly and frequently in aerial flights." What the judicial officer of the War Department construed the language used in the act relating to the Army to mean appears from the following language used in a communication addressed to the Adjutant General by Judge Advocate General Crowder on October 9, 1915, in response to a request of the acting chief signal officer for an expression of opinion as to whether an officer detailed for the purpose of developing a suitable system of radio communication from airplanes would be entitled to extra pay:

> "In order that Lieut. Culver may intelligently conduct his experiments it is necessary for him to fly during the period of the development of the apparatus. While flying Lieut. Culver is subject to the same risks as any officer now on flying duty and should, it is believed, receive while on duty *which requires him to participate regularly and frequently in aerial flights* the same compensation to cover the extra hazard as is paid to the other officers on similar duty." (Unpublished Op. J. A. G. Oct. 9, 1915.)

A like construction was placed upon this provision by the Comptroller of the Treasury on an appeal by an officer who had been required to refund $150.16

paid him as extra compensation while on detail to the Aviation Section but on leave of absence. The Comptroller said:

> The above act of July 18, 1914, provides for the detail of officers of the Army to the aviation section created by said act for aviation duty, and grants an increase of 50 per cent in the pay of their grade under their line commission "while on duty," requiring them to participate regularly and frequently in aerial flights.
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> Under the provisions of said statute it is not sufficient that an officer be merely detailed on aviation duty to entitle him to the increase of 50 per cent pay provided for in the act, but he must perform duty as well. The right to said increased pay is dependent upon *duty* rather than upon *detail*. The higher or increased pay is for aviation duty, requiring regular and frequent participation in aerial flights, and unless duty is rendered I do not think the right to the higher pay is earned. (22 D. C. T. 142, 143.)

It has also been urged in this class of cases in the court below that one consideration which induced Congress to pay this extra compensation was the fact that those detailed to aviation service could not secure insurance. But this representation is wholly unfounded. The only reference to the matter is found in the last sentence under the head "Pay of Aviators" of the report of the committee which accompanied the bill (House Reports., Vol. 1,

63rd Cong., 3rd Ses., page 11 of Rep. No. 1287). That sentence reads: "As officers and men engaged in aviation are unable to obtain life insurance, *the pension allowed is double that authorized to be paid in other cases.*" This not only shows that the inability to obtain insurance was not a consideration for the *extra pay, but conclusively shows why a difference was made between the conditions authorizing an increase in pay and those authorizing an increase in the guarantee and pension.*

If the construction of the statute as contended for by the petitioner is the true one the finding of the Court of Claims that "During all that time he (Luskey) was under orders detailing him for duty involving actual flying and made actual flights, one of which was in September, 1916, and two others in December, 1916, and was at all times capable of flying if so ordered" is sufficient. But if the Government's contention is correct it is not sufficient. The fact that he was at all times *capable* of flying is rather adverse to petitioner than favorable, as it shows that the failure to fly did not arise from sickness or other disability, but because *the duty of the detail* did not require regular flying. The only actual flights found were, one in September and two in December, 1916; and the question is whether these three flights entitled petitioner to the extra pay from July 1, 1916, to January 31, 1917. As those detailed are paid monthly, it is reasonable, we insist, that the claimant should actually fly within the month; or rather

that the duty should require him to fly during the month. If unable to do so because of disability the excuse would be valid, as the requirement of the duty would still exist.

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MARCH, 1923.

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